IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-6935

Supreme Court, U. S.
FILED
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MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

v.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

REPLY BRIEF FOR APPELLANTS

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SUMMARY OF REPLY

I. In this Reply, Plaintiffs-Appellants respectfully argue that the Defendant-Appellee State of Illinois officials have mistakenly interpreted the plain meaning of Sections 406(a) and 408 of the Social Security Act, 42 U.S.C. Sections 606(a), 608. In doing so the officials have failed to recognize that the Illinois statutory foster care scheme does engraft an additional criterion for AFDC-FC eligibility--placement in an approved home maintained by strangers--which is not found in the federal law. Defendants-Appellees have failed to recognize the true questions presented by the case and have mistakenly applied the rule of Dandridge v. Williams, 398 U.S. 471, 90 S. Ct. 1153 (1970), to the facts of this case. The Illinois state officials misinterpreted the legislative history, and have

violated logic, the intent of Congress, and the Supremacy Clause by their position that Plaintiff related foster children and foster parents are not foster children and foster parents within the meaning of the federal law.

II. The Illinois statutory foster care scheme is not rationally related to the overall legislative purpose of the state child welfare laws. The purposes and results achieved are directly contrary to the rational state interests the law seeks to serve. The scheme violates Equal Protection of Law. Some of the rational interests purportedly advanced are so ethereal as to nonexist. Defendants say that the Illinois scheme avoids fraudulent claims for foster care assistance, and stems a potential flood of applications. Yet both fraudulent claims and open floodgates are precluded by the Social Security Act itself.

The interest in the protection of children, if served, is protected at the

cost of doing violence to the main purpose of the state law: to preserve and strengthen families. The interests in encouraging adoptions and maintaining a large number of available foster homes are not served but rather harmed by the present law.

Finally, any state interest purportedly advanced by the discriminatory Illinois foster care scheme is based on an error of law: that the moral duty of non-parental relatives is the same as the legal duty of natural or adoptive parents. The District Court erred in equating them, and in their Brief Defendants-Appellees cumulate the error.

This Court should find that the Illinois laws challenged violate the Social Security Act, the Supremacy Clause and the Plaintiffs' constitutional right to Equal Protection of Law. The District Court's judgment should be reversed.

I. PLAINTIFFS MEET ALL THE FEDERAL CRITERIA FOR ELIGIBILITY FOR ASSISTANCE UNDER FOSTER CARE (AFDC-FC) PROGRAMS. ILLINOIS DENIES THEM ELIGIBILITY AND VIOLATES THE PURPOSE AND MEANING OF THE SOCIAL SECURITY ACT.

I. A.-B. Illinois has attempted to engraft an additional eligibility criterion onto those of the federal law.

Throughout its brief the Defendant-Appellee State officials respectfully and correctly cite the instances where this Court has struck down attempts by the states to exclude eligible persons from categorical public assistance benefits in violation of the Social Security Act. 1/

But while the Appellees understand the law properly, they urge an incorrect

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1 Appellee's Brief 12, 15, 16, 17, citing Townsend v. Swank 404 U.S. 282, 92 S.Ct. 502 (1972) King v. Smith 392 U.S. 309, 88 S.Ct. 2128 (1968) Lewis v. Martin 397 U.S. 552, 90 S.Ct. 1282 (1970) Carleson v. Remillard 404 U.S. 598, 92 S.Ct. 1932 (1972) Van Lare v. Hurley ___U.S.___, 95 S.Ct. 1741 (1975).

application based on their erroneous view of eligibility. Relying heavily on this Court's opinion in Dandridge v. Williams 398 U.S. 471 90 S.Ct. 1153 (1970) Defendants would have this Court believe that the only basis for Plaintiffs' claim is that the level of payment is different, and lower, for foster children living with relatives than for children placed with strangers.

This argument is misleading. Unlike Dandridge, supra; the Youakim case is not about the difference in level of payment between similarly situated but distinguishable members of the same class. Rather the questions are: first, for which program of categorical assistance are the Plaintiffs eligible? Second, if Plaintiffs are eligible for assistance under the foster care (AFDC-FC) program, in that they meet all the eligibility criteria in the federal

law, can the state ever deny those payments?

The responses to these questions are fixed by the current law: first, Plaintiffs and the members of the class they represent are eligible to participate in the foster care program because they meet all the eligibility criteria of the Social Security Act. Second, the state may not deny them the payments which persons who are eligible for the AFDC-FC program normally receive.

In its brief (at 14-21) the State of Illinois takes the curious position that the statutory scheme which bars AFDC-FC payments to state wards living in approved foster homes maintained by their relatives is really no "bar" at all since the plaintiffs are (or may be) eligible for the lower AFDC payments. So long as every foster child is eligible for something, the state argues, the scheme

is saved. But, following the reasoning of this Court in one of its most recent decisions, the State of Illinois is incorrect when it characterizes its scheme as consistent with the overall purpose and meaning of the Social Security Act. (Appellees Brief, 38).

In Philbrook v. Glodgett ____U.S. ____, 95 S.Ct. 1893, decided June 9, 1975, this Court considered the contention by the State of Vermont that it could bar eligibility for participation in the AFDC program to persons who meet all the federal eligibility criteria for the payments. The sole basis for the denial was the state's contention that the plaintiffs might be eligible for another categorical assistance program at a lower payment level, i.e., state or federal aid to families of the unemployed (AFDC-U). The bar would operate whether or not

the AFDC-U payments were actually received.

According to the Vermont officials, the mere fact of eligibility for unemployment compensation (AFDC-U, Section 407, 42 U.S.C. Sec. 607) payments precluded eligibility under the regular AFDC program. (Section 406(a) 42 U.S.C. Sec. 606(a).) But the Social Security Act itself neither set up such a bar nor granted the states the option to deny AFDC eligibility to persons who might be eligible for unemployment compensation. Accordingly this Court held the Vermont scheme unconstitutional. ____U.S.____, 95 S.Ct. 1893 (1975).

In Philbrook the State of Vermont made virtually all the arguments about the legislative history and H.E.W. Regulations that Illinois makes in Youakim. But there too, the Social Security Act itself made the plaintiffs eligible for

payments. [2] This Court, as it has many times before, again declared that the state "May not deny aid to persons who come within (a particular categorical assistance program) in the absence of a clear indication that Congress meant the coverage to be optional." Philbrook. supra, Burns v. Alcala ___U.S. ___, 95 S.Ct. 1180 (1975), King v. Smith 392 U.S. 309, 88 S.Ct. 2128 (1968) Townsend v. Swank 404 U.S. 282, 92 S.Ct. 502 (1972) Carleson v. Remillard 404 U.S. 598, 92 S.Ct. 1932 (1972).

Nothing in Title IV indicates that the states have the option to withhold from the categorical assistance under the foster care program from the plaintiffs here. [3]

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[2]See Section 407(b) (2) (c) ii, 42 U.S.C. Sec. 607.

[3]Illinois does consider the

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3 (Continued) Plaintiff foster parents to be participants in the state foster care program for certain of its own purposes: e.g., the government requires the Youakims to meet and maintain the same standards as licensed foster homes, and to submit to regular inspections, visits and reports by DCFS caseworkers. But despite the increased costs which the Youakims must bear in order to meet the same standards and perform all the same duties of foster parents who are strangers, the state does not subsidize the plaintiff children commensurately with the increased costs. The related foster parent must providethat subsidy. Plaintiffs incur all the duties and costs the same as all the state's foster parents. Yet for puroses of receiving the full foster care subsidy, the state says they are not foster parents.

The state repeatedly cites Dandridge v. Williams 398 U.S. 471 90 S.Ct. 1153 (1970) for the proposition that so long as plaintiffs receive some level of some kind of payments under Title IV of the Social Security Act they cannot complain. The defendants correctly state that the question of plaintiffs' eligibility to receive some public assistance is simply not involved. Everyone agrees that they are eligible for something; and defendants argue that since plaintiffs are eligible for something, then the Illinois scheme does not violate the Social Security Act.

But the Dandridge case is not applicable here. The issue in Youakim is: Under which program, AFDC (Section 406(a)) or the foster care program (AFDC-FC, Section 408) should the plaintiffs receive assistance?

Dandridge was not concerned with

the question of under which program an applicant is eligible. Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724 (1972) is more on point. In that case the Court sustained the state's action in granting higher subsidies to applicants under one program (Old Age Assistance) than under others (Blind and Disabled and AFDC). The Texas legislature could conclude that different categories of recipients had different levels of need, and fix the percentage of budget payments accordingly. But prior to the instant case, no court has suggested that if a citizen may happen to be eligible for assistance under one categorical assistance program then he is barred from eligibility for all others, and must always receive the lowest level of assistance. 4/

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[4]This Court held the contrary in

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(Continued) Philbrook v. Glodgett, supra. There is also contrary authority in the Social Security Act itself. See Section 402(a) (24), 42 U.S.C. Sec. 602 (a)(24), which excludes any S.S.I. benefits from determination of the amount of family income for AFDC purposes. The effect of this new subsection, (effective January 4, 1975) is to ensure that persons and families perhaps eligible under more than one categorical assistance program would receive the higher payments that Congress intended. See Title XVI generally, 42 U.S.C. Sec. 1381.

This is what the Defendants-Appellees argue. It is uncontested that the plaintiffs meet the federal eligibility criteria. They have been removed from their own home and declared wards of the state. They have a right to placement in the best home possible since they cannot live in their own home. They have a right to and a need for the full foster care subsidy of $105 per month to support themselves. But Illinois then removes eligibility when the child is placed in the home which is in fact and by declaration of policy, the best one for him. Illinois imposes an additional criterion: the placement must be with strangers, in order for the foster child fully to participate in the state's foster care program.

Plaintiffs, foster children placed in an approved foster home maintained by their relatives, meet the only

requirements for eligibility set out in the Social Security Act. They are court-declared wards of the state who have been removed from their own homes and they need assistance. [5/] The federal law contains no other criteria. The state attempts to engraft another requirement for eligibility, one which attaches after the fact as a result of the state's action. This engraftment means that eligibility is denied in those cases where the state does right by the children and places them in foster care in the homes of relatives. This violates the federal law.

In Townsend v. Swank 404 U.S. 282, 92 S.Ct. 502 (1972) the federal law set out two eligibility criteria for public aid recipients over age 18: need, and

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[5]See: Memorandum of the United States as Amicus Curiae at 4, filed herein, February 1975. See Appellants' Brief, 26.

participation in some kind of educational program. Illinois attempted to engraft an additional criterion: the educational program had to be high school or trade school--not frivolous college education. The attempt violated the federal law and this Court found the practice unconstitutional. So it should do in the instant case.

I. C. Defendant -Appellant state officials have misinterpreted the legislative history of the federal foster care program.

While the Appellees, in their brief (Sec. I-C, 28-33) attempt to show that the legislative history of the foster care program supports the state's position, the more reasonable interpretation of it is the one suggested by the plaintiff foster children.

As the state points out (at 28-29) Congress did in 1935 and has continuously

since recognized that the children who are cared for in institutions and in foster care "are in many respects the most unfortunate of all children, as their lives have already been impaired." Congress recognized the need to provide services which would be nationally and uniformly available for these children and for that purpose authorized a small amount of aid under Title V. S. Rep. No. 628, 74th Cong. 1st Sess. 19 (1935). Thus was the federal foster care program conceived, originally under Title V, and much later under Title IV, Section 408, the present law. 42 U.S.C. Sec. 608, as amended.

The state cites the history of Section 408 to show that the main purpose of the foster care program is the protection of children. (Appellee's Brief 30). This interpretation is reasonable and reasonably accurate. The difficulty

arises in the contention that this purpose overrides and displaces the overall purpose to maintain and strengthen family ties. (42 U.S.C. Sec. 601, Appellant's Brief 32 ff.) In order to protect children the way the state suggests, the overall stated purpose of Title IV must be perverted: families are pulled apart. If the plaintiffs prevail, both purposes of protection of children and preservation and maintenance of family ties will be advanced by placement in an approved foster home operated by a relative.

Plaintiffs-Appellants respectfully agree that the interpretation they advance is clear, unambiguous, and consistent with the legislative history and congressional purpose as set out more fully as follows.

The key characteristic of the children Congress sought to serve, the

quality that caught the attention of the Congress, was that the court had to remove the children from their own homes. It was for this reason that it voted a moreintensive and higher level of services for the foster children whose lives had been damaged by the court-ordered removal (see discussion in Appellee's Brief, 22-23). Obviously, the Plaintiff children have suffered this unfortunate experience.

The AFDC-FC eligibility--and congressional concern--attach the moment the juvenile court's gavel falls. At that time the court and the appointed guardian probably have no idea where the child will eventually be placed. It would be most unlikely that Congress intended for eligibility for AFDC-FC assistance to attach for awhile, but then evaporate in the face of the availability of the best placement--one

in an approved foster home maintained by relatives. And the best placement can occur only if the relatives are able to pay a tax of $42.00 per month per child. (Cf. Appellants' Brief p. 40-41). 6/

I.D. Plaintiff foster parents are foster parents and Plaintiff foster children are foster children within the meaning of the federal foster care (AFDC-FC) program.

Any child who has been removed from his own home by court action and declared to be a ward of the state is subject to and in need of the more intensive government intervention required under the state's foster care program. All of the state's foster children, regardless of with whom they live, do in

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6The "tax" may be higher than $42 if the child is not receiving regular $63 AFDC payments under Sec. 406(b) the same as he would receive in his own home.

fact receive the different, more intense degree of governmental intervention needed to repair their damaged lives. All the state's wards, all its foster children, including Plaintiffs, are placed in homes which meet higher standards than "regular" AFDC Sec. 406(a) homes. The homes are more carefully and more often inspected, and must generally conform to high standards of space, cleanliness and quality of family life. These standards are imposed on the homes of all persons who provide foster care, whether they are maintained by relatives or strangers to the foster children placed with them.[7/] This Court

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[7]From the outset Plaintiffs Youakim have alleged that their home, and the related homes in which other class members are placed, comply with the same standards as all foster homes. (Complaint, Paragraph 17, 18 App. 9). Plaintiffs and in fact all foster parents ask the Court to note that it costs more to maintain a home that complies with

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(continued) the strict licensing standards for foster homes. Congress agrees with them. Sen. Rep. No. 744, 90th Cong. 1st Sess. 1967 U.S. Cong. & Adm. News. V. 2 3001, 3002. Cf. Appellant's Brief 35-36.

has likewise recognized the greater cost of foster care. Ramos v. Montgomery 313 F. Supp. 1179 (S.D. Cal. 1970) aff'd 406 U.S. 1003, 91 S. Ct. 572 (1971).

A second characteristic of the Plaintiff children which places them squarely within Section 408 eligibility [in contrast to recipients of regular AFDC living with non-parental relatives (Section 408a)] is the degree of support services provided them by the State. All state wards--foster children, including Plaintiffs, theoretically have in addition to a regular welfare caseworker, a specialized DCFS caseworker assigned to them to provide monitoring and guardianship services which are not available to children who receive assistance under Section 406(a). All state wards--foster children, including Plaintiffs theoretically must have a written casework plan designed to improve the

conditions in and facilitate the return to the [Section 406 (a)] homes from which they were removed. Sec. 408 (f) (1) 42 U.S.C. 608 (emphasis added). The guardians of all state wards--foster children, including Plaintiffs, must file with the juvenile court annual reports on the status and progress of their wards, Juvenile Court Act, Ill. Rev. Stats. Ch. 37, Sec. 705-8 (2). No such reports are required for children who receive regular AFDC under Sec. 406(a).

The State of Illinois recognizes that all its wards--all its foster children, including Plaintiffs, do need more, and more expensive, government intervention "to repair their damaged lives." It provides the greater services to all the foster children, including Plaintiffs in the state. It provides the $105 foster care subsidy

to all foster children in the state except the members of the Plaintiffs' class who must, with their related foster parents, themselves bear the costs of the increased services. To say that one of the state's foster children like Timothy Robertson is "no longer considered to be receiving foster care." [8] once he is placed in the approved relative's home which meets all the standards for foster care, for the purpose of receiving foster care, and where he does receive foster care and where he is subject to the same government intervention and monitoring services required for all foster children is at best difficult to comprehend.

In light of this Court's comments in Burns v. Alcala __U.S.__, 95 S. Ct. 1180 (1975), Plaintiffs-Appellants

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[8] As Appellees say in their Brief, 31.

do not wish to engage in a battle of the dictionaries.[9] To do so is irrelevant, since the only issue here is how Congress meant to use the term foster care, a legal term of art, when it enacted the amendments to Title IV. Plaintiffs-Appellants believe that the term, as used by Congress, includes services and assistance provided pursuant to Section 408 (42 U.S.C. Section 608) to children who have been removed from their own homes, adjudicated wards of the Court, and placed in an approved home which meets all the State licensing standards. Plaintiffs

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[9] For every dictionary definition the Appellees produce with the term "unrelated" or its equivalent in the definition of foster care. Appellants can produce one without the term. Cf. the Oxford English Dictionary; the Random House American Dictionary.

believe they are included in the term.

The United States in its amicus brief on behalf of the Department of Health, Education and Welfare agrees. The most recent policy directive of H.E.W, includes the Plaintiff foster children and foster parents in the federal program.

The Appellees' position is untenable because of its internal-inconsistency. The state says on the one hand that since the Plaintiff children are living with relatives they cannot participate in, and receive benefits under the AFDC-FC program, and then it requires them to perform virtually all the duties required of foster parents under that program.

Unlike Dandrige, this case is not about a difference in level of payments paid out to similarly

situated persons eligible for the same categorical assistance program. Rather this case is like Jefferson v. Hackney, supra or Philbrook v. Glodgett, supra where the question is in what category do Plaintiffs belong? Because they are declared wards of this Court; because they have been removed from their own home (i.e. the home of parent or close relative) where they were eligible for AFDC within the previous six months; because they are placed in homes which meet all the standards for a foster care license; because they receive all the support, casework and guardianship intervention required for and needed by foster children, the Plaintiffs are foster children. They are in foster care program (Sec. 408) category. They must

receive the full foster care subsidy like all the other state wards--foster children in Illinois.

II. THE ILLINOIS FOSTER CARE SCHEME WHICH DISCRIMINATES AGAINST THE PLAINTIFF CLASS OF FOSTER CHILDREN VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

II. A. No rational state interest is served by the Illinois foster care scheme which denies assistance to Plaintiffs.

A discriminatory scheme like the Illinois foster care system will be sustained only if the discriminatory classification advances some rational state interest. The various interests that the state suggests may be advanced by the challenged Illinois Statutes are here considered in the order in which they appear in Appellees' Brief. (43 ff.)

1. Provide as many (strangers') foster homes as possible (44, 47).

2. Encourage non-parental relatives to care voluntarily for children who do not live with their parents and who have not been adjudicated wards of the state, and encourage adoptions (at 48).

3. Avoid a flood of petitions to have children adjudicated state wards, and by implication, avoid fraudulent claims (48-49).

4. Avoid discrimination against (and lawsuits on behalf of) non-parental relatives who provide care for children and receive regular AFDC (Section 406a) assistance.

Not specifically set out in the state's brief is the overriding, primary purpose of Illinois child welfare laws:

5. To render service to maintain and strengthen families. (Cf. Appellants Brief 45 ff. and n. 13) In order to pass constitutional muster the challenged statutes cannot be inimical to the overall purpose of the state's child welfare scheme.

Plaintiffs comment on these interests

in turn:

1. The state has not reached its goal to establish the largest number of foster care resources in the homes of strangers. Plaintiffs have alleged--and could prove--that there is a serious shortage of available foster care resources with strangers.[10/] The avowed

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[10]Illinois, like all the states, still has a large number of its children in institutions. Plaintiff Larry Robertson lived in an orphanage until September 1974. Since then he has lived with the Youakims, a fortunate beneficiary of the state's bizarre "exception to policy" policy (Cf. Appellant's Brief 9. n. 1) It is important to note that once full foster care payments were available to Larry that an excellent foster home--the Youakims'--could be found for him. It is a gross comment on the irrationality of the system that Larry was not placed in foster care until age 15, and that it took 28 months from the filing of his federal complaint to secure foster home placement and payment. Larry had wanted and hoped to live with the Youakims for over two years. They wanted to take him in. But the family was kept separated because of the discriminatory denial of foster care payments. Only after two years of litigation, and after he had

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[10](Continued) filed his appeal in the U.S. Supreme Court, did the Defendants decide Larry to be worthy of benefit from the "exception to policy" policy.

purpose of the present law, to develop more resources, has not been achieved. The best source from which the resources could be developed--the relatives of the state's wards--is effectively foreclosed by the challenged law.

2., 3., and 4. The purported purposes of encouragement of non-parental relatives to care for children who cannot live with their parents, and the interests in avoiding fraud, floodgates and discrimination are answered in the Social Security Act. The state's fear that non-parental relatives who now receive AFDC benefits for nonadjudicated children will all appear at the juvenile court and file wholesale petitions, legitimate or fraudulent, to have their charges found to be abandoned or neglected and declared to be state wards is groundless. (Appellees Brief 48-49, n. 18). The present system, the state

suggests, dams the flood and dodges the fraud.

These concerns by the Defendants, and the state's interests in avoiding the flood and fraud problems, arise out of an incomplete or mistaken reading of the Social Security Act. The federal law itself, by its definitions of eligibility, foreclosesthe problems.

The two main eligibility criteria for participation in the AFDC-FC program: 1) state wardship and 2) removal from the home of a relative by court action. 42 U.S.C. Sec. 608 (a)(2)(B)(4)(B)(ii). In order for a child who is not a state ward and who lives with non-parental relatives to receive assistance under the foster care program it would be necessary for the juvenile court 1) to declare him to be a state ward, and 2) to order him removed from the home of the relative with whom he

had been living before the court's intervention. Thus, the non-parental relatives who now provide Section 406(a) homes for children, have absolutely no economic incentive to seek a neglect finding. They cannot become the related foster parents of the children for whom they care because the statute requires, as a condition of eligibility for foster care (AFDC-FC) assistance, removal from the home in which the child has been living. In the cases of children who live with non-parental relatives who receive regular AFDC payments, the overall family income would actually decrease if the court removed a child. Cf. 42 U.S.C. Sec. 606(a).

For the same reason there is no substance to the state's speculation that an acceptance of plaintiffs' position may result in a denial of equal protection to relatives caring

for related children without an intervening court adjudication. (Appellants Brief at 49). This question likewise does not arise in this case. The federal statute sets the eligibility standards for participation in the AFDC-FC assistance program under Section 408. It would be impossible for the non-adjudicated children to meet the eligibility criteria and remain in the same home.

The question of the economic disincentive to adoptions by the non-parental custodial relatives is similarly absent from this case. Since the federal eligibility criteria leave no possibility for non-parental relatives to secure foster care payments for their non-adjudicated wards, there is no sense to the argument that the possibility of AFDC-FC payments may discourage adoptions. 11/

[11]In fact the economic incentives run the other way. The Illinois Department of Children and Family Services will pay long-term support to persons willing to adopt older and "hard-to-place" children. Ill Rev. Stats. Ch. 23, Sec. 5005. (App. 23, 25-26.) These adoption subsidies are available to all persons, including non-parental relatives. The richest source for adoptive parents for older and "hard-to-place" children is foster parents. Logically, related foster parents would be the best candidates of all because of their prior lifelong relationship with the children. The subject of subsidized adoptions in relation to foster care is discussed at length in a recent report prepared by the Defendants. See Hargrave, Shireman, and Connor, Where Love and Need Are One: A demonstration of the use of subsidy to facilitate the adoption of black children in need of permanent homes. Report of Study Grant OED CB. 71. Ill. DCFS 1975, 110 p., esp. Chapter III. "The Children in Foster Care." Three copies of this Report have been lodged with the Clerk of the Supreme Court.

5. The last and paramount state interest which must be advanced by the challenged foster care scheme and by the entire state child welfare setup is to service, maintain and strengthen families. Plaintiffs have argued in their Brief that this overriding purpose is disserved and perverted by the present law. The economics of the Illinois foster care scheme discourage and prevent placement with related foster parents. Families are not strengthened by the present foster care system. They are literally pulled apart.

Defendants themselves graphically paint this picture in their recent report on the Illinois subsidized adoption programs.[12/] The report described

[12]Hargrave, et. al. Where Love and Need are One., Ill. DCFS (1975) 110 pp. Cf. Note 11 supra.

the attempt by the Defendants to secure adoptive homes for as many children as possible from a group of 1,900 black children in Chicago, virtually all of whom were in foster homes or institutional placement. The Report states:

> The children in the total sample were, as has been noted, young at separation from parents, the mean age being 3.7 years. Indicative of an expected total absence of relationship with parents, 23 percent had never lived with their parents. Of the 750 oldest children (over 12 years of age) only 9 percent had lived with their parents since they were 12. Sixty-nine percent last lived with parents at under six years.
>
> Thus it is evident that, whatever the reason for entering foster care, these children had relatively few family ties, perhaps because they had been in care so long. Twenty-five percent had ties with the mother, 12 percent had ties with relatives and only 9 percent with their father. (O)nce in foster care, it seems there is little likelihood of a child's maintaining contact with this family over a period of years, and little likelihood of actually returning home. Id at 23. (emphasis added)

And:

> In sum these children entered foster care at a young age for various reasons; a high proportion due to parental neglect or abandonment. Once in care a variety of patterns of contact with relatives developed, but an amazingly high proportion of children lost contact with biologic families, except for siblings in the same foster home. An exception is the one-third of the children who entered care due to parent neglect or because of their own behavior problems and retained contact with families over the years. This raises interesting questions about the possibility of preventive or rehabilitative services for this group of families. Indicative of the failure to involve the parents of these children in decision-making, 75 percent of the parents had no plan which was known to the Department caseworker for the termination of foster care. Id at 24-25.(emphasis added)

The present Illinois foster care scheme does not strengthen families. Plaintiffs assert that the best interests of the State of Illinois and of its foster children would be best served if

this Court reverses. The end result might be a net savings for the taxpayers and improved placements for the foster children.

If full AFDC-FC payments were available to children who receive foster care in approved homes maintained by their relatives four desirable results would obtain:

1. The cost of finding, recruiting, and approving or licensing foster homes would be reduced;

2. More children whom the court decided had to be removed from their parents would live with relatives;

3. Some children could move out of foster homes maintained by strangers and into approved foster homes maintained by their relatives. Thus there would be more already recruited and licensed homes available for children whose relatives could not provide foster care services;

4. Some older, "hard-to-place" children (like Plaintiff Larry) who are now in institutional care, or who have to be placed in a series of foster homes (with attendant economic and psychological costs) could be placed with relatives.[13]

This Court should declare the challenged discriminatory practice unconstitutional so that the state interests now allegedly served can in fact be served--to do so would give effect to the overall state and federal purpose to maintain and strengthen family life.

II. B. <u>The State's entire case is based on an error of law: i.e., that the moral duty of relatives is the same as the legal duty of parents.</u>

Nothing in Defendants-Appellees extensive discussion of the "moral duty"

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[13]See n.10 supra

of non-parental relatives to care for their foster children answers or negates Plaintiffs' position.

In Illinois, only natural and adoptive parents have a legal duty to support their children. Ill. Rev. Stats. Ch. 23, Sec. 2-11. Neither foster parents nor non-parental relatives have any similar or analogous legal duty. The emotional advantages of the familial bond cannot be translated into a financial duty where the law has imposed none. See Appellants' Brief 11.

It is proper and permissible for the state to recognize the emotional and social well-being flowing from the family relationship when it seeks to place children with relatives after a judicial determination that the child must be removed from his own home. To do so is consistent with the Social Security Act. A state which refuses to

recognize this in making its foster placements violates that Act.

But the state cannot expand this "sense of family spirit" (Appellees Brief p. 46) into a presumption of contribution of money where no legal means of enforcing such contribution exists. The state is barred from assuming that non-legally responsible persons will apply their resources to aid the child.[14/] The District Court indulged the assumption, or allowed the Defendants to indulge in the assumption that related foster parents should and would in fact willingly contribute a substantial part of the financial obligation owed by the state as guardian to its wards.[15/]

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[14]See Lewis v. Martin, 397 U.S. 552, 90 S. Ct. 1282 (1970), Van Lare v. Hurley ___U.S.___, 95 S.Ct. 1741. Marotti v. White, 312 F. Supp. 823 (1972)

[15]This is not a welfare case where the state can rely on the principle that the recipient has no constitutional right to

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[15](Continued) have all his needs met. Rosado vs. Wyman 397 U.S. 397, 90 S.Ct. 120 (1970), Jefferson Hackney, supra, Dandridge v. Williams, supra. Defendants are the guardians of the persons of the ward. They stand in the same position as the parents. The state is the parent, and as such has the legal duty to care for all the needs, in particular all the financial needs of its wards. Ill. Rev. Stats. Ch 3, Sec. 139; Ch. 23 Sec. 5005. (1973).

This was error. The trial court then found that the Illinois scheme did not violate equal protection because the foster parents who were related to their foster children could be legally distinguished from foster parents who were strangers. The basis for the distinction is that their "moral duty" to support their kin gives rise to an expectation, cognizable at law, that they will in fact do so. The Illinois state legislature and DCFS could rationally take this expectation into account in constructing its foster care program. Youakim v. Miller 374 F.Supp. 1204 (N.D. Ill. 1974).

The District Court erred in its conclusion that the state could assume the Plaintiff related foster parents had the same duty to support their foster children as had the natural parents in Ramos v. Montgomery. 313 F. Supp. 1179,

(S.D. Cal. 1970) aff'd 400 U.S. 1003 91 S.Ct. 572 (1971). Its finding, based on this conclusion, that the Illinois scheme does not violate the Equal Protection Clause is a mistake. This Court must correct it, and reverse the judgment below.

CONCLUSION

For the reasons stated herein and in the Brief for Appellants, Plaintiffs-Appellants respectfully ask that the District Court's summary judgment for Defendants be reversed with directions to enter summary judgment for Plaintiffs, or in the alternative, to set the matter for trial.

Respectfully submitted,

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